

(1946) 06 CAL CK 0001

In the Calcutta High Court

Case No : Full Bench Reference No. 2 of 1941 in Appeal from Appellate Decree
No. 220 of 1938

Nikhil Chandra Ghatak and Others

APPELLANT

Vs

Dingamanik Union Board and Others

RESPONDENT

Date of Decision : 14-06-1946

Acts Referred:

Citation : (1946) 06 CAL CK 0001

Final Decision : Allowed

Judgement

Chakravartti, J.—In the year 1864, the Bengal Legislature commenced a course of legislation on the pattern of English statutes under which public roads and certain other means of communication were placed under the control and management of local authorities. A beginning was made with municipal areas and, as in England, it was thought that in order that the local authorities might effectively discharge the obligation laid upon them, it was necessary to vest in them some property in the material objects to which the public right was attached. What was thus vested in the local authorities was not the same under all the successive statutes, but was enlarged or varied from time to time. Under Act III of 1864, it was all public highways, not being the property of and repaired by and kept under the control of the Government and not being private property.

Under Act V of 1876, it was

all roads, bridges, embankments, banks, ghats, wharves, jetties, wells, channels and drains, not being private property and not being maintained by Government or at the public expense.

Under Act III of 1884, it was at first the same as under the previous Act, but, on amendment by Act IV of 1894, came to be

"all roads, including the soil, and all bridges, embankments" etc,

the rest of the provision remaining unaltered. "Road" or "highway" was defined as a road, street, alley, passage, etc., over which the public had a right of way ; and each Act contained a provision that the local authority might over roads, channels, etc., in private ownership by agreement with the person in whom the property therein was vested.

2. In 1885, the Legislature extended the scope of such legislation to rural areas and by Act III of that year vested the control and management of roads, bridges, channels, etc., held by the District Road Committee, in District Boards, adding that the roads, bridges, channels, etc.

shall include and shall be deemed to have after included the soil and the sub-soil beneath these parties,

excluding, however, the minerals. Roads, bridges and channels, owned by the Crown, might also be placed under the control and management of District Boards, but only with their consent. The control of District Boards might be delegated to Local Boards. A further provision was enacted to the effect that in where the Local Government had constituted a Union,

all village roads and bridges thereon and the stones and other materials thereof must be placed under the control and management of the Union Committee.

3. Further expansion of this legislative policy took place in 1919. In that year, it was thought

expedient to develop the system of self-government in the rural areas of Bengal

and to that end Act V of 1919 was passed, which extended to the whole of Bengal, but was to come into force in such areas as the Local Government might, by notification, direct. In areas where this Act was brought into force, that part of Act III of 1885 which dealt with the powers and duties of Union Committees, was to stand repealed. Sec. 4 (8) of this Act defined "road" in practically the same terms as the Municipal Acts, viz.,

any road, street or passage, whether a thoroughfare or not, over which the public have a right of way,

Sec. 19 of the Act provided that

every road, building or other work constructed by a Union Board from the Union Fund shall be vested in the Union Board by which it has been constructed.

and by sec. 31 it was enacted as follows :--

The Union Board shall have control of all roads, bridges and waterways within the Union, not being private property and not being under the control of the Local Government or the district board or the local board, and may do all things necessary for the maintenance and repair thereof, and may--

* * * * *

(d) widen, open, enlarge or otherwise improve any road or bridge;

(e) deepen or otherwise improve waterways,

4. The word "Local" preceding the word "Government" was recently changed into "Provincial" under the Government of India (Adaptation of Indian Laws) Order, 1937.

5. The kind or class of roads committed to the control of municipalities under the old Bengal Municipal Acts and the nature and extent of the property vested in them, have been the subject of considerable litigation in the Courts. The language of those Acts and that of Act V of 1919 is, in all essential respects, identical ; and the various Acts, whether dealing with municipalities or District Boards or Union Committees or Union Boards, appear to have been enacted in pursuance of, in this respect, a common legislative intention and to have in view the same kind of roads and channels. The question in the present case is whether sec. 31 of Act V of 1919 (The Bengal Village Self-Government Act), the terms of which have been quoted above, contemplates a waterway over which the public have a right of passage, but which runs across private lands.

6. The Plaintiffs have raised this question in connection with a portion of a khal which joins two other khals, known as Kartickpur and Gharishar khals, and thus completes a watercourse ultimately reaching the river Padma. It can be used as a boat passage only during the three months of the rainy season, viz., Sravan to Aswin, but is not a mere track annually improvised by the people across flood waters when rains inundate the locality, as is commonly done in the lower plains of Bengal. It is a well-defined track, excavated as a khal, and has been separately recorded as such in the settlement papers, with a note that it is for the use of the public. According to the case of the Plaintiffs themselves, it was constructed by the villagers as long ago as in 1877 in order to meet a public necessity, because the water-course which had been serving the locality till then, had been blocked up at one point by a new road built by the local zemindar and driven across it. Apparently, the inhabitants of the place have their homesteads in a long, continuous row, with a ditch adjoining each homestead and the method adopted for the construction of the khal was simply to join up these ditches by cutting away the land intervening between them. It is not disputed that since its construction, the khal has been used by the public as a boat passage during the rainy season, but equally, it is not now disputed on the other side that the land over which it lies belongs to private individuals. For a part of its course, the khal flows through lands which are owned by the Plaintiffs in howla right, but they appear also to have purchased the subordinate interest in some of the riparian plots in that part. The record-of-rights describes the khal as appertaining to khas lands of the zemindar, but this has been found to be wrong and the khal really passes over land held by various people in subordinate interests. As already stated, so far as a portion of the khal is concerned, the land on both its sides as

also its bed is the property of the Plaintiffs.

7. The khal had been silting up and ceasing to be serviceable as a boat passage. In that state of things, the local Union Board, in the year 1934, re-excavated it in spite of, it is alleged, protests by the Plaintiffs who offered to re-excavate, at their own cost, that portion of the khal which flowed through their lands. It is admitted that by the re-excavation of the khal, the public have been benefited and boats can now pass along it freely.

8. No other riparian owner complained of the action taken by the Union Board, but the Plaintiffs challenged it by instituting the suit out of which the present Reference has arisen. Their case was that apart from the right of the public to pass and re-pass along the khal by boat during the rainy season, all other rights were in the owners of the land over which it flowed and the interference by the Union Board was entirely unauthorised and constituted an invasion upon their rights of property. Accordingly, they asked for a declaration of their title to the land underneath the relevant portion of the khal as also damages for loss caused by the removal of earth from its bed in the course of deepening it. The rest of the allegations and prayers are not material to the Reference and will be considered at the time of dealing with the appeal itself.

9. The defence of the Union Board began, as is usual with Mofussil defences, with a wholesale denial of every allegation made by the Plaintiffs and every claim advanced by them, but the only case made by the Board to which we need refer is the more modest one that the khal being a public khal, its control and management had vested in them absolutely under sec. 31 of the Bengal Village Self-Government Act.

10. The trial Court gave the Plaintiffs a decree for title in the soil underneath the khal and also gave them damages for the earth removed from the bed. Further, it granted a permanent injunction against the Union Board, restraining them from taking earth from the khal,

except for the purpose of keeping the boat, passage fit and in proper condition,

but that also only if the Plaintiffs, on being asked by the Board by a written notice to excavate the khal according to their directions, should refuse to do so.

11. On appeal by the Board, the learned Subordinate Judge set aside the decree of the trial Court except so far as it declared the title of the Plaintiffs in the land of the khal, but he modified the decree in the last respect as well by excluding one of the plots situated on the bank and half the bed opposite thereto. Plot No. 679, he held, had admittedly been lost by the Plaintiffs to one Saijuddin Jamadar who was in adverse possession of the land and, consequently, they had lost their title to half the bed of the khal as well, so far as it lay opposite to Plot No. 679.

12. From this decision the Plaintiffs preferred a second appeal to this Court which came to be heard by Mr. Justice Mukherjea and Mr. Justice Roxburgh. It was contended before them on half of the Appellants that since the khal lay on lands

owned by private individuals, it was private property, although the public might have a right of way over it, and that being so, its control and management could not vest in the Union Board under the provisions of sec. 31 of the Bengal Village Self-Government Act. The learned Judges were not prepared to accede to this contention, but it had the support of the decision in *Lalit Mohan Saha v. Debendra Nath Thakur* 40 C. W. N. 838 (1936) rendered on appeal under the Letters Patent from a decision of Mr. Justice Mitter. It was there held that sec. 31 of the Bengal Village Self-Government Act did not apply to a public road, the sub-soil under which was private property, but the learned Judges in the present case thought that Mr. Justice Mitter had the correct view and that all pathways and waterways over which the public had a right of passage, were within the purview of sec. 31., even if the land underneath belonged to private individuals. They could not, however, decide the case in accordance with their opinion in the face of the contrary decision of a Division Bench and, accordingly, referred to a Full Bench the following question of law :

Whether under sec. 31 of the Village Self-Government Act, the Union Board can have any control over any road or water passage over which the public has a right of way, but the sub-soil under which belongs to a private individual.

13. Under the rules of the Court, the whole second appeal was also referred for disposal by the Full Bench which might hear the Reference.

14. Strictly speaking, the question raised by the Appellants is not open to them in second appeal. As has been seen, by the decree made by trial Court, the right of the Union Board to control and manage the khal was recognised and the only qualification made was that the power of control and management would not extend to excavating the khal without a chance being given to the Plaintiffs to do it themselves, under the directions of the Board. The Plaintiffs did not appeal from this decision and, on an appeal by the Board, the Appellate Court held that the power of control and management was absolute and the Board had every right to re-excavate the khal for public benefit. The Plaintiffs not having appealed from the trial Court's decision, the only question open to them under the strict procedure is a question relating to the measure of the Board's control, but they can no longer impugn the right of control itself. It is worthy of note that none of the ten grounds taken in the Memorandum of Appeal to this Court contains the remotest suggestion that the Board have no right of control and management over the khal, but on the other hand all proceed on the assumption that they have such right and only exceeded it in widening the khal beyond its proper limits and cutting down trees standing outside its site. However, as the Division Bench entertained the objection, we do not think it would be proper on our part to disallow it and to refrain from dealing with the Reference on the ground that it does not arise.

15. The learned referring Judges observed that, in their opinion, the expression "not being private property," in sec. 31 of the Village Self-Government Act, referred to the road or waterway itself and not to the land underneath and that,

accordingly, in order that a road or waterway might vest in or come under the control of the Union Board, it was enough if qua road or water passage, the public had a right of way over it. Their Lordships expressed their entire agreement with the reasons given by Mr. Justice Mitter in support of this view.

16. It is surprising that the attention of the Division Bench should not have been drawn to the decision of a Full Bench on the precise point in question, given with reference to the Bengal Municipal Act of 1884, as amended in 1894. The language of that Act is exactly similar, except that instead of "shall have control," the word "vest" is used. The Full Bench decision was given within a month of the decision from which the Division Bench has dissented and is reported in the same volume of the Calcutta Weekly Notes [Nirod Chandra Mukherjee v. Chairman, Kamarhati Municipality 40 C. W. N. 1070 (1936)]. It is interesting to note that one of the learned Judges who constituted the Division Bench in the present case, then at the Bar, appeared for the Municipality and contended for the same view of the law as taken in the Order of Reference.

17. It was contended before us on behalf of the Appellant that both the Division Bench in the present case and Mr. Justice Mitter in the case relied on had disregarded the definition of "road" as given in the Act, though the latter quoted it towards the beginning of his judgment. "Road" was defined as "any road, street or passage over which the public have a right of way" and if sec. 31 was read along with that definition, it would be found to relate, as respects roads, to "roads over which the public have a right of way, not being private property." It was quite clear, therefore, that the Legislature did contemplate roads over which the public had a right of way, but which were yet private property and it expressly excluded them, including only such of those roads as were not private property. The view that the Legislature regarded roads over which the public had a right of way as not private property, qua roads, in all cases, and that the presence of that incident alone would suffice to bring a road within the purview of the section, could not, it was contended, possibly be correct.

18. It was contended in the next place that since in the view of the Legislature a road, subject to a public right of way, could as well be private property as not, the test for determining whether it was the one or the other would be the ownership of the land upon which the road lay. A public right of way, as such, gave no other right to the public than that of passing and re-passing along the land and, subject to that burden, all rights in land dedicated to public use as a road remained in the owner. Accordingly, a road over which the public had a right of way could belong to them as property only if the land underneath belonged to them as well. If the land belonged to private individuals, the road was private property, the public having no property in it, but only a right of passing and re-passing along the surface.

19. It was lastly contended that the matter was concluded by the decision of the Full Bench in Nirod Chandra Mukherjee v. Chairman, Kamarhati Municipality 40 C. W. N. 1070 (1936), though it was conceded that as a reasoned statement of

the view taken, the majority judgment was not very helpful.

20. On behalf of the Respondent Board, it was contended that sec. 31 said nothing about public property but was, in this respect, expressed in a negative form, speaking only of roads which, qua roads, were not private property. The test for determining whether a road, regarded as a road as distinguished from the land underneath it, was private property, would be whether anyone had the right to exclude the public from using it. If no one had such right, as in the case of roads over which the public have a right of way, the road, qua road, was not private property, although the land underneath might belong to private individuals. Sec. 31, therefore, covered all roads over which the public had a right of way, irrespective of the ownership of the site and only excluded roads from which the owner of the site could exclude anyone at his pleasure. As regards the definition of "road" which, read with sec. 31, seemed to involve that roads, although subject to a public right of way, could still be private property, the Respondent's contention was that the definition would not apply to the word as used in sec. 31, being repugnant to the subject and context.

21. The Appellants rejoined by contending that an obligation to permit a limited kind of user by others did not prevent property being privately owned and they referred to a well-known passage in Salmond's work on jurisprudence.

22. The Full Bench, in the case already referred to, decided the question in a somewhat peculiar way. If we may say so with respect, it is very easy to understand what the majority of the learned Judges actually held in that case less easy to understand their reasons. But as far as we can gather, they appear to have that by the identical language used in the gal Municipal Acts, whether the Act of 1884 or that Act as amended in 1894, roads, subject to a public right of way, were contemplate capable of being, as well as not being, private property, although both classes might lie private land. Those over which the public general had a right of way were not private property, but those over which only certain persons other than the owner of the land had such were. Sec. 30 of the Act (which corresponds to sec. 31 of the Village Self-Government with which we are dealing) contemplated roads of the former class and the word "public" in the definition of "road" had been loosely used.

23. The view taken by the minority of the Judges is clearer. They appear to have held that roads over which the public had a right of way, not be private property, qua roads, although the land underneath might belong to private in duals and that, accordingly, all roads, subject to a public right of way, were covered by sec. 30, whether lying over private land or not view of sec. 30 would not accord with the definition of "road" as given in the Act, but the learned Judges thought that, in sec. 30, the word "road," had been loosely used.

24. According to both the views, roads over which the public in general had a right of could not be private property and would be within the purview of the vesting section, even if they might he over privately owned lands. In the present

case, according to the Plaintiffs themselves, the local public in general had right of passage over the khal and such is finding of both the Courts below. The Full Bench decision is therefore against the Plaintiffs and if the principle of that decision be applied to the facts of the present case, their contention must fail. We, however, propose to examine the legal position for ourselves.

25. The question is not altogether free from difficulty and it will be useful to remember that, as referred to a Full Bench, it covers both roads and waterways. "Waterway" is not defined in the Act and to a waterway, many of the considerations, applicable to a road, would not apply. To mention but one matter, the basis for the argument, available in the case of roads, that the statute itself contemplates public passages which are private property, does not exist in the case of waterways, since there is no similar definition clause. But the Reference was argued before us in terms of a road and although the special argument, based on the statutory definition of "road," may not have been apposite, it must, we think, be conceded that as regards the question whether a public passage can be private property, the position in the case of land and water must be the same, at least in the contemplation of the same Act.

26. Sec. 31 of the Bengal Village Self-Government Act speaks of roads, bridges and waterways together and provides that the Union Board shall have control of such of them, and all such, as are within the. Union, are not private property and are not under the control of the Local Government or the District Board or the Local Board. These requisites must bear a sense equally applicable to all the three means of communication mentioned. There is no difficulty as to the condition regarding location or the absence of control by other authorities. The only question is the true meaning of the first requisite.

27. It seems clear to us, as it did to Mr. Justice Mitter and the learned referring Judges, that the phrase "not being private property" in sec. 31 refers to roads, bridges and waterways, as such, and has no reference to the land underneath. It is of these and not of the land below that control is vested in the Union Board and it is these which are spoken of as "not being private property." This is in accordance with the common object, in this regard, of the whole succession of statutes to which we have referred, which did not have in view and were not regulating property in land, but were only placing public means of communication under the control of public authorities. The possibility of private ownership must, therefore, be considered with reference to roads, bridges and waterways as such, and not with reference to the kind on which they may be situate.

28. But what are roads, bridges and water-ways, as such? Where a statute gives a definition, for questions under the statute, that definition must prevail, but otherwise, reference must be made to the general concept of the objects. The Bengal Village Self-Government Act defines only one of the three items, viz., a road, and defines it by user as "a road, street or passage over which the public have a right of way." Beyond suggesting that a road is something more than a

mere right of way, since it is a road, street or passage "over which" the right of way exists, the definition gives no indication as to whether the Legislature regarded a road as having any corporeal content.

29. Dealing with roads in the case of *Lalit Mohan Saha v. Debendra Nath Thakur* 40 C. W. N. 838 (1936), Mr. Justice Mitter, whose reasons the learned referring Judges adopted, appears to have held that a road was not a mere right of way, nor the bare surface of the land over which the right was exercisable, but the surface, together with a stratum of the soil beneath of such thickness as might be reasonably necessary for the use, maintenance and preservation of the road as a road. For this proposition he relied upon three English cases, viz., *Coverdale v. Charlton* [1878] L. R. 4 Q. B. D. 104, *The Mayor of Tunbridge Wells v. Baird* [1896] A. C. 434 and *Finchley Electric Light Company v. Finchley Urban District Council* [1903] L. R. 1 Ch. 437 and observed that this view had been adopted in the later of the Indian decisions, although formerly a more restricted definition was favoured.

30. With great respect, it appears to us that the decisions relied on by Mr. Justice Mitter bear on a different matter altogether. They were decided under the Public Health Act. 1875, or that Act, read with some special Act, and the question in them was not what roads, as such, were, but a road having vested in a rural or urban authority under the provisions of the statute or statutes, what had actually vested in them. They were decisions, not on the character or content of a road as a road, but on the effect or extent of the vesting provision, or as Lord Halsbury put it in the case of *The Mayor of Tunbridge Wells* [1896] A. C. 434 on

the true effect and meaning of the vesting of a street in a local body.

31. Later in his judgment, the Lord Chancellor made the scope of the decision clearer when he said that by the statute there concerned, Parliament had vested the street, qua street

and, indeed, so much of the actual soil of the street

as might be necessary for its preservation and use. Similar observations were made by the other Lords of Appeal in this case and by the Judges in the other cases, which show that they were treating the street and the soil as different things and were only considering whether any part of the soil had vested in the local authority under the words of the vesting provision.

32. To our mind, the scope and effect of these decisions is reasonably clear. They do not purport to pronounce on the question as to what a road or a street, in itself, may be, but only hold that where a statute has vested a street in a local authority for the purpose of its control and management, it must be taken to have also vested a part of the soil, for unless so much was vested the power of control and management conferred by the statute would be ineffective. A part of the soil had vested in the local authority, not because it was a part of the street, but because, having regard to the scope and object of the Act, it must be taken

to have been included in the vesting. The question with which these decisions deal is, therefore, a question arising at a stage subsequent to the vesting of a street, the vesting being accepted as a fact. They have no application to a case where the question is the initial one, viz., whether a particular passage is a road or street at all, or such a road or street as could have vested under the words of the statute.

33. Indeed, if "road" always meant the surface of the land, together with the soil underneath of a certain depth, it would be easy enough to determine what roads were private property it would have to be held that roads, the soil under which was the property of private individuals, belonged to them. It is trite knowledge that when an owner dedicates, or is presumed to have dedicated, land for use as a public road, he retains his property in the soil, the right of Public being merely a right of passage. Any conception of a road, which includes a stratum of the soil underneath as a part thereof, must involve private ownership of roads which lie over private land, subject though they may be to a public right of way. There is, besides, the difficulty of applying the concept to water-ways and in their case it would be a question whether a water-way would mean the surface of the water together with a stratum of water underneath such as would be necessary for navigation or the whole volume of water, together a stratum of the soil below.

34. We think, however, that a road or any other passage, regarded purely as such, does not include any part of the material object underneath as its corporeal content, but consists only in the means or medium of passing as afforded by the surface. Even the surface is not the road as a material object, but the surface in its use a means of passage. We think further that, in any event, it is in this sense that the Bengal Village Self-Government Act regards road, bridges and water-ways when it declares in sec. 31 which of them shall be under the control Union Boards and it is to roads, bridges and water-ways, so regarded, that the criterion "not being private property" is applied. Neither the present Act, nor any of its predecessors enacting similar legislation, has any concern with roads or channels as so much land or water or as property : they only contemplate them as means of communication.

35. The first paragraph of sec. 31 falls into two parts, one part where the objects dealt with are mentioned, viz., roads, bridges and water-ways, and another part containing the operative clause whereby the objects dealt with are placed under the control of Union Boards. When the section, in its first part, speaks of roads, bridges and water-ways, "not being private property," it means not being private property under the general law, for up till then, the operative clause has not come into play and there can be no question yet of anything vesting in the public authority by force of the statute, as in the cases rebel on by Mr. Justice Mitter. What classes of roads, bridges and water-ways then are marked off by the phrase "not being private property"? In our opinion, the true answer is furnished by two circumstances. One of them is that if a road, bridge or water-way is contemplated by the section as a mere passage, as we have held it is, then, if

the public have a right of way over it, it cannot at the same time be private property, because its whole content is occupied and exhausted by the public user and there is nothing left for anyone else to own. It is true that if anyone is bound to permit a limited user of his property by others, he does not thereby cease to be its owner, but on the conception of "road" or "water-way" which we are considering, the subject-matter of ownership is not the land or water. It is only the passage, or the light and means of passing, regarded as such, and if the public are entitled to its unrestricted use as of right, it is wholly appropriated by them and there is nothing else in the road or waterway which is left to the owner of the soil and which can be his private property. Roads, bridges or water-ways, which are not private property, must therefore mean all roads, bridges or water-ways, over which the public have a right of way.

36. The second circumstance which points to the same meaning of the words is that, outside them, sec. 31 contains nothing to show that it is only passages, subject to a public right, with which the section is concerned. Yet, that is the whole scope of the Act in this regard : it does not purport to control private passages in which the public have no rights. So far as roads are concerned, it may be said that the definition clause supplies the requirement of a public right of way, but the Act contains no similar, or any, definition of bridge or water-way and unless the qualification is attached to them from somewhere, the position must be that while sec. 31 deals with only such roads as are subject to a public right of way, it does not require that incident in the case of bridges and water-ways and even those bridges and water-ways over which the public have no right of way are within the section. Such a view of the section, in our opinion, is plainly impossible. We think that in sec. 31, the Legislature does not use the word "road" in the sense of the definition clause, but uses it in the ordinary sense ; and then it uses the phrase "not being private property" as applying to all the three items and as signifying "over which the public have a right of way." That is the method the Legislature employs for keeping within the scope of the Act and placing the three items in the same position. It drops the definition in the case of roads, dropping therewith for the time being the requirement that there must be a public right of way, and next it imposes the same requirement on all the three items by a new form of words, viz., "not being private property," which is intended to import the same condition as is contained in the definition of "road." If the successive statutes dealing with roads be examined, it would seem that in the vocabulary of the Bengal Legislature, the phrase "not being private property" has always been an equivalent of "over which the public have a right of way."

37. Thus the main requirement of sec. 31 is that in order that a road or water-way may come within its purview, it should be subject to a public right of way and no exception is made in the case of roads or water-ways lying over private land. Indeed, in view of the further requirement that the road or water-way must not be under the control of the Government or the District Board or the Local Board, the section must, almost necessarily, refer to public roads and water-ways

lying over private land, if it is to refer to anything in actual existence at all. It may be that some special questions may arise in the case of bridges, but we are not invited by the question referred to consider them.

38. In our opinion, the Legislature, in sec. 31 of the Bengal Village Self-Government Act, was only drawing a distinction between roads and water-ways, subject to a public right of way, and those not so subject, and it was not making any distinction between public and private ownership of the underlying soil. It may not have used language such as a rigid grammarian would use, nor acted upon a strictly jurisprudential concept of property, but it has made it sufficiently clear to any reasonable mind that it intended to place all public passages by land or water, within a Union, under the control of the Union Board, to whomsoever the soil underneath might belong. The answer to the question referred must, therefore, be in the affirmative.

39. At one stage of the argument, it was faintly contended that the khal in the present case was not a waterway at all, since it could be used as a boat passage only during three mouths in the year. In our view, this contention is not well-founded. The Act has reference to the geographical conditions of Bengal where enormous areas go under water every year and thousands of water-lanes are formed to serve in lieu of roads which are flooded. A provision as to water-ways contained in an Act which deals with roads and water-ways of this Province, cannot, in our view, be held to exclude channels which dry up or from which the water recedes, after the rainy season. On general principles too, we consider that a channel which fills up with water for certain months every year and is used as a boat passage as long as a route by water is needed in the locality, can properly be called a "water-way" within the meaning of a statute which deals with means of communication.

40. Proceeding next to deal with the appeal, the first question to consider is whether the Appellants are entitled to any damages for the earth removed in the course of excavation. Clearly, they are not. Once a water-way has come under the control of the Union Board, the latter cannot interfere with the soil, so far as necessary for the purposes of maintenance and repair of the water-way, under the very words of the section, in the opening paragraph and in cl. (e), and also under the principle of the cases to which Mr. Justice Mitter referred. The finding of the lower Appellate Court is that the Board cut earth for the bona fide purpose of re-excavation and only so much earth as was necessary.

41. The claims on account of alleged loss caused by throwing earth on crops standing on adjoining lands and by the cutting down and removal of certain trees, are wholly concluded by the findings of the lower Appellate Court and nothing further need be said about them.

42. The Appellants are, however, entitled to succeed with respect to their claim of title to half the bed of the khal, opposite to Plot No. 679, Their title to that plot has been extinguished by the adverse possession of one Saijuddin, but thereby

the adverse possessor has not acquired any title to the bed of the khal, contiguous to the plot. The presumption that the owner of land adjoining a public road or a stream, is owner also of half the road or the bed of the stream, is only "presumptio juris and not juris et de jure : it may be rebutted by evidence," e.g., by proof of acts of ownership by another or by proof of title in or deduced from some person who was the original owner. In the present case, the original title having been in the Plaintiffs and evidence of user of the bed, such as it is, being all in their favour, there is no scope for application of the presumption in favour of Saijuddin. The title of the Plaintiffs to half the bed of the khal, adjoining Plot No. 679 and opposite thereto, must therefore be declared.

43. The Appellants must also succeed with respect to their prayer for an injunction, restraining the Defendant Board from constructing any road or path on land of the Plaintiffs in or alongside the site of the khal. The trial Court had granted them such an injunction but the lower Appellate Court set aside the order, without giving any reasons at all and without any discussion of or reference to the question. The Defendant Board has no authority under the Act to construct any road or path on land belonging to the Plaintiffs, without their consent and there was sufficient evidence before the trial Court of a plan or attempt to do so which justified the issue of an injunction. It must, in our opinion, be restored. In the result the question referred to a Full Bench is answered in the affirmative. The appeal is allowed in part and the judgment and the decree of the lower Appellate Court, in so far as they modify the trial Court's declaration of the Plaintiffs' title as regards half the bed of the khal opposite Plot No. 679 and reverse the order for a permanent injunction, against the construction of a path on or alongside the disputed khal, are set aside and the decree of the trial Court, in those respects, restored. The rest of the judgment and decree of the lower Appellate Court is maintained. In view of the circumstances of the case, we direct that each party will bear its own costs throughout.

Biswas, J.

I agree.

Blank, J.

I agree.